

<b>OWENS &amp; HURST LUMBER CO., INC.,</b>	)	<b>AGBCA Nos. 2001-140-1</b>
	)	<b>2001-141-1</b>
Appellant	)	<b>2001-142-1</b>
	)	
<b>Representing the Appellant:</b>	)	
	)	
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	)	
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	)	
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P. O. Box 7669	)	
Missoula, Montana 59807-7669	)	

**DECISION OF THE BOARD OF CONTRACT APPEALS**

**December 16, 2002**

**Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.**

**Opinion for the Board by Administrative Judge POLLACK. Opinion by Administrative Judge VERGILIO, dissenting.**

These appeals arise out of three separate timber sales, Contract No. 14-01-050420, Lawrence Mountain Pest Control; Contract No. 14-04-056435, Fish Fry Salvage Sale; and Contract No. 14-04-054034, French Mudpickens Sale, between Owens & Hurst Lumber Co., Inc. (Appellant), of Eureka, Montana, and the U. S. Department of Agriculture, Forest Service (FS or Government), Kootenai National Forest, Libby, Montana. Each of the disputes involves a claim for return of interest on what the FS found to be late payments on the timber sales. The appeal was submitted on the record. Each party provided various supplements as described in the opinion below.

The Board has jurisdiction to decide these appeals under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. ' ' 601-613, as amended.

**FINDINGS OF FACT**

1. In a letter dated April 26, 1988, Ms. M. Jane Mellem, who at the time was a Timber Sale Contracting Officer (CO) for the Kootenai National Forest, wrote a letter in which she informed Federal Timber purchasers that had active sale contracts on the National Forest, that new deposit procedures were established for payments associated with timber sales. Purchasers were advised that payments were to be sent to a post office box in San Francisco, California, instead of to the local FS office. The letter advised that the new address for the San Francisco post office box would be shown on the bill of collection. In addition to advising as to the new mailing address, Ms. Mellem also addressed other means of providing payment. As an alternative to mailing, the letter advised purchasers that the FS was offering the option of using wire transfer. The letter went on to describe that procedure. The letter then provided further details as to use of regular mail. The letter stated that if regular mail was to be used, then the purchaser had to take into account mail time to San Francisco. The letter provided that the cutoff time for mail-in payments was 9:30 a.m. at the post office box. The letter then continued:

Payments that arrive after 9:30 a. m. will be deposited as the next day's business. Late payments are subject to interest charges regardless of who is at fault. To avoid late payment interest charges, you should allow at least 5 days mail time. If your first payment to the new address arrives late, we will furnish you information on the postmark date and the date of receipt at Bank of America. If, after being notified your payments continue to arrive late, interest will be charged. Late payments postmarked on the due date or on the day before the due date will almost always result in a late payment interest charge.

The letter then set out a third option, use of messenger delivery (i.e. Federal Express, DHL, etc.) (Attachment to Declaration (Decl.) of M. Jane Mellem (Mellem)). In various correspondence Bank of America is referred to by the parties as BOA.

2. In addition to the above noted letter, for several years thereafter, the procedures were also incorporated into the award letter provided to successful purchasers for all new timber sale contracts. The procedures were also verbally discussed with new purchasers that had not been aware of them. (Decl. Mellem 4.)

3. Because the October 1988 letter introduced new and different procedures than what purchasers had been accustomed to, the CO chose to give purchasers a period of adjustment, under which she allowed late payments without interest for a period of 1 month or for the first payment due under the new procedures (Decl. Mellem 9).

4. In October 1999, Mr. Thomas Maffei, currently the Timber Management Officer for the Kootenai National Forest, was the Alternate Timber Sale CO for the Forest (Ms. Mellem was the Timber Sale CO). In Ms. Mellem's absence, he signed a letter (for Ms. Mellem) dated October 8, 1999, which informed all timber purchasers, active on the Forest's bidding list, that there had been a change in address to which payments to the FS must be sent via regular mail. He provided the new address. His letter also addressed wire transfers. As described by Mr. Maffei, the letter was mainly

to inform the purchasers of an address change and to inform them that there had been a change in one of the 14 required lines of information for a wire transfer. (Appeal File (AF) 5-7; Decl. Maffei 1-5.a.)

5. In his October 1999 letter, Mr. Maffei identified the cutoff period for mail-in deposits as 7:00 a.m. He stated that payments received after 7:00 a.m. would be posted for the following business day. While the 7:00 a.m. time was a change from the 9:30 a.m. time in Ms. Mellem's earlier 1988 letter, the time for receipt of mail at the post office box had actually changed some years previous to 1999. In his letter Mr. Maffei again included wording advising purchasers that they should allow at least 5 days for mailing time and again stated that late payment would be subject to interest charges, regardless of who was at fault. (AF 5-7; Decl. Maffei 7.)

6. Through his employment with the FS, Mr. Maffei was familiar with Owens & Hurst, having business dealings with them for over 6 years (Decl. Maffei 10). Similarly, Ms. Mellem was also familiar with Owens & Hurst and that familiarity ran over a 16-year period (Decl. Mellem 10).

7. The FS awarded to Appellant Contract No. 14-01-050420, Lawrence Mountain Pest Control on December 12, 1991; Contract No. 14-04-056435, Fish Fry Salvage Sale on December 19, 1996; and Contract No. 14-04-054034, French Mudpickens on February 18, 1994. The CO on each sale was Ms. Mellem. Each of the contracts indicates a termination date predating the matters in issue. While that is not germane to the dispute before us, we note that fact and presume that the contracts at some point were extended. (AF 32-38.)

8. Each contract contained provisions regarding monetary payments. Essentially the clauses called for payment of interest if the payment was not made within 15 days of the bill of collection. The exact wording in each contract covering this matter was somewhat, but not materially, different. The controlling clause for the Lawrence Mountain sale was CT4.4 - PAYMENTS NOT RECEIVED (1/84). (AF 33.) The controlling clause for Fish Fry Salvage and French Mudpickens was CT4.4- Payments Not Received for Timber Cut and Other Charges (Option 1) (8/93) (AF 35, 37, 38).

9. The FS sent Bills of Collection to the Appellant for each of the three sales. The bills each included a line designated as due date. For each bill it showed a date of December 25, 1999. Each bill however also contained at the upper right hand corner, a box identified as A1. Bill Date: 12/27/99." The parties have agreed that the December 27 date was the due date for billing. (AF 48-50.) On December 20, 1999, Appellant mailed the payment in issue in this appeal to the FS. The payment was sent by certified mail, return receipt requested. (AF 11-13.) The payment in the amount of \$457,926.93 was included in a single check which covered billings for each of the three contracts in issue (AF 40, 51). According to the Appellant, in making the payment, it followed instructions received from the FS that were dated October 8, 1999 (AF 5-7) and which directed Appellant to send payment to:

USDA-Forest Service  
File 71652  
P.O. Box 60000

San Francisco, CA 94160-1652

10. In a memorandum dated June 13, 2001, which memorialized a telephone inquiry from a Resource Specialist at the FS to Ms. Joanne Ribberty, Forest Service Account Representative at Bank of America, Ms. Ribberty addressed the handling procedures for mail. The telephone call prompting Ms. Ribberty's response was made to discuss what sort of tracking mechanism was in place for Bills of Collection that were sent CERTIFIED RETURN RECEIPT REQUESTED. The following information was provided by Ms. Ribberty. She stated that any business addressed to USDA- Forest Service, File 71652, P.O. Box 60000, San Francisco, CA 94160-1652, is picked up by a BOA contracted courier service at the local post office every hour between the hours of 9 p.m. and 7 a.m. The local San Francisco post office processes only incoming mail between those hours. Outgoing mail received at the local post office is processed outside of the hours discussed. Ms. Ribberty stated that any CERTIFIED RETURN RECEIPT REQUESTED mail is picked up at the local post office by the contracted courier service but no log is maintained to track that mail. (AF 54.) In the final paragraph of this memorandum, the author makes conclusions as to local San Francisco delivery date and states on what date the payments were credited to Owens & Hurst. It is not clear from the memorandum whether those conclusions reflected those of Ms. Ribberty or the conclusions of the writer of the memorandum.

11. In addition to the above, the FS also submitted the Declaration of Maricruz Girolo, who identified herself as the current customer service manager and vice president Bank of America. During the period in issue, she was a customer service representative. She stated that she was familiar with the details of how payments are received and processed through the lockbox area. She said that included the lockbox in issue here, the one addressed File 71652, P.O. Box 60000, San Francisco, CA 94160-1652. (Decl. Girolo 1-4.)

12. According to Ms. Girolo, the lockbox (or post office box) in issue is located at a Bank of America facility. Lockbox is a service where Bank of America receives checks and remittance documents on behalf of clients who subscribe to the service. The checks are deposited to the client's account and photocopies of the checks, along with the remittance documents, are sent to the client so they may update their accounts receivable. (Decl. Girolo 4-5.)

13. Mailings addressed and sent to a lockbox are picked up through a contract courier service. According to Ms. Girolo, the courier retrieves mail from the lockbox daily when mail is available. The courier service also receives a list of certified mail that is waiting to be picked up at the U.S. Post Office. PS Form 3883, is a U.S. Post Office form used by the contract courier service and Bank of America to identify specific certified mailings and receipt of those mailings. Ms. Girolo was informed and believed that the contract carrier service provides a PS 3883 Form for envelopes addressed to Bank of America. Ms. Girolo attached to her declaration, a copy of a filled out PS Form 3883. The form shows 10 entries, the second of which is the Owens & Hurst payment, identified as Z 745 271 790, the same identification on the December 31, PS Form 3811, the form titled "Domestic Return Receipt." (AF 12; Decl. Girolo.)

14. PS Form 3811, U.S. Postal Service form A Domestic Return Receipt, shows a date stamp of December 31, 1999. The form was addressed to the P.O. Box which was identified in Mr. Maffei's October 8, 1999 letter. There is no direct evidence from either party as to precisely how and by whom the December 31 stamp was placed on the form. The FS contends that the stamp would have been placed at the time the article was picked up by the courier at the local post office. That however, does not establish, on its own, that December 31 was also the date that the payment arrived at the post office. (AF 12.) There was no mark on the envelope to show when Appellant's payment arrived at the local post office in San Francisco.

15. On or about January 5, 2000, the FS became aware that an expected December 1999 payment for the timber sale contracts by Appellant had not been received in a timely manner (AF 39). Appellant was then assessed interest for delinquent payments. After affording Appellant time to decide whether to make payment, the FS on February 20, 2000, authorized a transfer of funds totaling \$1,786.44 for payment of interest and administrative fees associated with this delinquent payment. (AF 44-46.) In a letter of March 2, 2000, Appellant informed the FS that the assessment was paid under protest (AF 43).

16. By letter dated December 15, 2000, Appellant submitted its claim. It stated that payments had to be sent to a A Box in San Francisco and be there by the payment due date, that a FS letter told purchasers, A To avoid late payment interest charges, allow at least 5 days mail time, and that the due date for payments was December 25, however, since it was a holiday that fell on Saturday, the new due date was December 27, 1999. Finally, Appellant noted that its receipt for sending the certified mail (date of mailing) was postmarked December 20, 1999. There appears to be no dispute over any of these matters. (AF 13, 29, 30.)

17. The above letter then continued and referenced that PS Form 3811, Domestic Return Receipt, states the Return Receipt will show the date and to whom the article (in this case the payment) was delivered. Appellant then stated, A This did not happen. There was no post mark. However, while not addressed in Appellant's letter, the date of delivery, Box 7 of PS Form 3811, as noted above, contained the date stamp of December 31, 1999. (AF 12, 29.)

18. Appellant continued that the current Bill for Collection now contains the following statement. A Failure to make payment by the due date will result in the assessment of late payment charges (interest, administrative cost, and/or penalty charges) in accordance with your contract, permit or the Debt Collection Act of 1982, as amended. Post marks are not honored. Appellant then states the following, A This statement indicates that post marks were honored in the past. (AF 29, 30.)

19. From the above, Appellant then draws four stated conclusions. Those are:

1. Owens & Hurst Lumber Company, Inc. did mail the payment at least 5 days prior to the due date.
2. It was mailed to the correct Post Office Box.

3. There is no evidence showing the payment was delivered by the due date.
4. Prior to, alleged late payment, there is evidence that under your current ruling Owens & Hurst Lumber Co., Inc. has not been late in mailing their payments.

We assume that in number 3 above, Appellant meant no evidence showing that it was not delivered by the due date.

20. By three separate letters, each dated January 4, 2001, Mr. Maffei, the current CO on the contracts, issued final decisions as to interest on each sale. The interest claimed for Fish Fry Salvage Sale was \$552.69, for Lawrence Mountain Pest Control, \$1,187.76 (AF 17), and for French Mudpickens, \$45.99. (AF 17-28.)

21. Appellant filed a timely appeal, dated March 12, 2001, on all three matters. In its letter of appeal, Appellant made the following points. Appellant had a record of meeting its obligations by due dates. It was its intent to do so in this case. Once it mailed the payment on December 20, 1999, it was at the mercy of the government to deliver it on time. It had used the form of delivery here in other instances with satisfactory results. Appellant then made an additional argument. It pointed out that the instructions it had received dated October 1999, stated that Areceipt of mail-in payments is 7:00 a.m. at the Post Office Box.@ Appellant states that AThese instructions do not indicate that penalties will be assessed on when payment is received by the Bank of America. As there was no post mark on the envelope to show when our payment was at the Post Office Box, we contend that our payment was delivered on time. This is based on the fact we allowed more than five days mailing time.@ Finally, Appellant made the statement that AThere are indications that this method of delivery of payments could be used for financial gain by the receiving parties.@ (AF 3, 4.)

22. The matters were docketed by the Board on March 21, 2001, as Owens & Hurst Lumber Co., Inc., Fish Fry Salvage, Contract No. 14-04-056435, AGBCA No. 2001-140-1, Lawrence Mountain Pest Control; Contract No. 14-01-050420, AGBCA No. 2001-141-1; and French Mudpickens, Contract No. 14-04-054034, AGBCA No. 2001-142-1 (AF 8, 9).

23. In a letter of May 22, 2001, the Board asked the FS to provide certain information in its Answer. Those were a statement as to when the payments in issue were actually placed in the box; who placed the December 31 dates on the receipts (Form 3811 and 3883); when that was done and under what circumstances; and finally whose initials are set out in the space at boxes 5 and 6. The FS responded by letter of August 29, 2001. Material to the Answer is that the initials are those of the couriers and the December 31 stamp on Form 3811 is from the Postal Service.

24. On February 7, 2002, the Board conducted a telephone conference with the parties, at which time the parties determined that they desired to proceed on the record. At that time the Board provided each party with the opportunity to submit any additional documents and/or affidavits. Thereafter, both parties provided additional information. Appellant replied by letter of March 19, 2002. At paragraph 3 of that response, Appellant provided information on an August 11, 1999, Bill

of Collection on another sale (McGuire), where the FS (Kootenai) did not charge a late payment based upon Owens & Hurst showing that it had sent the payment guaranteed second day delivery by the Post Office. According to Appellant, the FS there accepted the late payment because Appellant was able to show that its intent was not to pay late. In addition, Appellant provided a list of bill payments showing dates mailed and dates received on a number of other sales. The dates provided showed all listed items being received by the FS within 5 days of mailing and in many instances earlier. (Appellant's Supplement (App. Supp.) to App. letter of March 19, 2002.) Under cover letter of April 8, 2002, the FS provided two documents in response, each of which addressed the waiver of interest as to the August 1999 billing on the McGuire sale. In the document dated September 10, 1999, the FS reported a conversation with an official or employee of Appellant regarding the matter. In describing the conversation, the FS stated that Judy at Owens & Hurst was told that the FS had decided to waive interest, however then advised her, ABUT BECAUSE IT IS THE RESPONSIBILITY OF THE PURCHASER TO ENSURE DELIVERY OF MONIES TO BOA BY DUE DUE [DATE, sic] THIS WAS THE LAST TIME INTEREST WOULD BE WAIVED.®

### DISCUSSION

There is no disagreement that Appellant mailed its check to the FS on December 20, 1999, and expected the check to be at the designated post office box in San Francisco in sufficient time to meet the due date for payment. The mailing period in issue was within the Christmas holiday season. There is no disagreement that the payment was due by December 27 at File 71652, P.O. Box 60000 in San Francisco. (Findings of Fact (FF) 7-9.) The above address, provided to Appellant by the FS, is also referred to as the lockbox. The lockbox is located on the premises of a Bank of America facility. The lockbox is where Bank of America receives checks and documents on behalf of clients, such as the FS. Mailings that are addressed to the lockbox are picked up at the local post office through a contract courier service and taken to the Bank of America premises. (FF 10-13.)

Therefore, mail sent by Appellant had to go through at least two hands, once Appellant gave up possession. The first was the U.S. Postal Service. That entity had to get the mail from Montana to the local post office in San Francisco. The second was the contract courier. At some point, the courier picked up the mail at the local post office in San Francisco and then delivered it to the lockbox. (FF 10, 13.) The evidence is undisputed that the payment got to the lockbox on December 31, 1999, well after the due date (FF 14). There is absolutely no evidence putting the payment at the lockbox before that date. What is not clear factually, however, is when the mail got to the local post office in San Francisco and what happened to the payment between that time and its arrival at the lockbox.

The contract sets out no exceptions for good faith or intent nor does the contract specify any other particular conditions or circumstances that excuse late payment. (FF 7). Particularly relevant here is that there is no language, such as the wording one finds in many solicitations as to bid timeliness, where special rules are set out for determining timeliness for registered and certified mailings. Language in solicitations often provides that if a bidder uses certified or registered mail, then the Government accepts the risk of late delivery by the postal service. The FS did not provide that protection in these contracts. Similarly, there is no language, such as language in our Board Rules, which specifically designates the mailing date as the filing date for an appeal of a CO decision.

Instead, here, the contracts conveyed that payments not received at the designated address by the due date were subject to an interest charge.

While, as noted above, the contract does not provide for exceptions, contract law provides that a party may not unreasonably hinder or interfere with the other party's performance. Depending on the circumstances, mishandling of mail (in this case the payment) could constitute such an unreasonable interference. However, a finding of mishandling in this case would have to be based on evidence of chargeable action on the part of the FS which delayed receipt of the payment. The Appellant would have to show that, but for FS action, the mail would have arrived on time and have to show evidence of mishandling or other action by the FS, so as to have caused the delay of mail (that would otherwise have arrived on time). In those instances where Boards have allowed relief because of mishandling by the Government of mail (generally in the late bid cases), the mishandling being charged must be that of the receiving agency and not the postal service. See Overhead Electric Co., ASBCA No. 25656, 85-2 BCA & 18,026. Relief resulting from postal service actions requires some language in the contract allowing for that relief. There is no such language here. In this appeal, other than Appellant's argument that it mailed the payment on time, Appellant has neither provided nor developed any evidence showing improper or wrongful action on the part of the FS. Appellant has also produced no evidence of postal service mishandling.

In contrast to the above, the FS has produced evidence to support the conclusion that it did nothing to hinder the mail and to support the conclusion that the payment did not arrive at the local post office by the due date. If we accept the statement of Ms. Ribberty, and we have no reason not to, any business addressed to the FS is picked up by the courier service at the local post office, every hour between 9 p.m. and 7 a.m. The courier service also picks up any certified return receipt requested mail. (FF 10.) That means that on each business day, the courier is at the post office and it follows that if mail is there, he or she would pick it up. The statement of Ms. Ribberty, as to the procedure followed by the courier and Bank of America, is further supported by the Declaration of Ms. Maricruz Girolo, customer service representative with Bank of America. (FF 10-13.) Further, each of the documents which provides us a date stamp, those being PS Form 3811 (Return Receipt) and PS Form 3883, contains date stamps of December 31, 1999. But for Appellant's mailing receipt, dated December 20, 1999, we have no other date stamps.

Taking into account all the evidence, we conclude that the courier service followed its normal procedures and did so on December 27, 28, 29 and 30. There is no evidence on which to reasonably conclude otherwise. Since Owens & Hurst's payment was not picked up from the local post office until December 31, 1999, and since we have determined that the courier followed normal procedures, we conclude that at a minimum the payment was not at the local post office on December 27, 28 or 29. We recognize the possibility that the payment could have reached the local post office on December 30, after the last scheduled pick-up. Even if that was the case however, December 30 was well beyond the due date. For us to come to the conclusion that payment was in the local post office box on December 27, 1999, would require us to believe that the courier service did not follow its normal routine or that it followed its normal routine but somehow ignored the presence of the Owens & Hurst payment for 4 days. The evidence does not support such a finding. We also cannot ignore the fact that this mailing was occurring during the Christmas holiday season.

While, difficulties or delays in mailing do not always occur during the Christmas season and the potential for mail delay during that period is not on its own dispositive as to our ultimate decision, it is a factor that is relevant in setting the surrounding circumstances.

Taking the evidence before us, the preponderance of the evidence supports the conclusion that the mail did not arrive at the local post office until some time on December 31, 1999 (or late on December 30), that the courier first knew of the mail on December 31, 1999, that the courier acted in accord with normal procedures, and therefore there was no action of the FS or those acting on its behalf which caused the mail to arrive late at the lockbox. In Zisken Construction Co., ENG BCA No. 1781, 1960 WL 185 (1960), the Corps of Engineers Board had to decide a motion to dismiss involving the date of mailing (as opposed to date of receipt, as is the case here). There, the Board noted that the only hard evidence to establish the date of mailing was a postmark on the letter which showed a date well beyond the due date. In finding the late mailing not to be excusable, the Board addressed the contractor's contention that there had been a delay in the mails. After pointing out the date of the late postmark, the Board addressed the lack of evidence to sustain a decision in favor of Appellant. The Board stated, "The contractor has neither alleged or undertaken proof as to the act of mailing itself. In the absence of such showing, our record does not justify any conclusion that the appeal letter had been mailed as early as 29 August 1957, which was the last day for making appeal in this case. That would require a finding, wholly without evidence, as much as an 11 day Post Office delay in postmarking the letter. Of course there is no such presumption favoring Appellant." The Board conclusion in Zisken, is just as applicable here. Appellant has produced no evidence to support any mishandling. For us to find in its favor would require us to presume error and mishandling that has not been proven.

We are mindful that Appellant did provide a list of various mailings of checks to the FS and lockbox, which shows that for the listed mailings, a five-day mailing period was adequate or more than adequate. Those results do not, absent more, establish that the FS or anyone on the FS's behalf mishandled the mail. (FF 24.)

We now turn to the other arguments put forward by Appellant. First, Appellant says that since FS said in its 1999 instruction letter that the payment should be mailed within 5 days, the FS was bound to honor any mail sent within the 5-day period. There is no legal basis for Appellant's position. The 5 days was not a guarantee. In fact, the wording as to the 5 days was modified by the phrase "at least." (FF 1, 5.) We read the phrase "at least," as used in the context of the letter, to be a warning and not a guarantee and to convey to the reader that a greater time period may be necessary.

The Appellant, as mentioned above, also contended that its intent should control. We do not doubt Appellant's intention to meet the due date. However, the contract is the agreement of the parties and under its plain meaning, if one misses the date, then interest is applied. Unlike the exceptions for mishandling (hindrance or interference discussed above), there is no legal exception based on an intention to meet the requirement. We are charged with deciding issues based on the agreement of the parties as set out in the contract. The contract calls for payment by a certain date or payment of interest. The Appellant did not meet the date. Questions as to whether imposing interest is fair or whether it should have been waived are questions of policy and therefore outside the decision

making power of this Board. As we have demonstrated in a number of cases, where the contract is clear, we will not attempt to go around the agreement, even where the Board or a deciding member might have decided otherwise on a purely policy basis. See Rich Macauley, AGBCA No. 2000-155-3, 01-1 BCA & 31,350; Don Dwyer Development Co., AGBCA No. 2000-107-1, 02-2 BCA & 31,980, recon. denied, AGBCA No. 2002-153-R (Nov. 14, 2002). Further, from a policy viewpoint, holding a party to an established due date is not unreasonable.

We also find no merit in the argument that the FS waiver of interest for August 1999, created a basis for recovery. The fact a party agrees in one instance not to enforce a provision does not waive its right to hold a party to an obligation, should a violation occur at a later date. Moreover, the evidence presented by the FS shows that Appellant was warned at the time, that further lateness would result in assessments of interest. (FF 24.) We similarly find no merit in the Appellant's argument that the FS had an earlier policy of accepting postmarks. First, Appellant has not established that such policy existed. Second, and more important, the letters of 1988 and 1999 make clear that receipt date is controlling. (FF 1, 3, 18, 24.) Finally, we also reject placing responsibility on the FS for a failure of the post office not to have recorded on PS Form 3811, Domestic Return Receipt, the date and to whom the article (in this case the payment) was delivered (FF 17). As noted earlier, actions of the Postal Service are not attributable to the FS. Moreover, while the information would have been helpful, the lack of the information does not translate into evidence from which we could establish a date of receipt and does not overcome the other evidence surrounding the December 31 pickup of the payment at the local post office.

In response to the dissent, we disagree with the expansive reading given by the dissent to the wording, "To avoid late payment interest charges, allow at least 5 days mail time." While the dissent may find the Government interpretation to have no meaning, we find otherwise. The wording is clearly an attempt at warning and the words "at least 5 days" are not a guarantee, but part of that warning. Further, the record contains internal e-mails regarding late payment of the McGuire sale, a matter occurring in September 1999. In the e-mail of September 10 (FF 24), the writer states that she called Judy at Owens & Hurst and told her that the FS would waive interest,

ABUT BECAUSE IT IS THE RESPONSIBILITY OF THE PURCHASER TO ENSURE DELIVERY OF MONIES TO BOA BY DUE DUE [DATE, SIC] THIS WAS THE LAST TIME INTEREST WOULD BE WAIVED. I suggested they use wire transfer process as bank wire transfer receipt would serve as proof of payment. I agree that O & H has sent Express Mail in good faith but also believe it cannot be depended upon. Bottom line - - they are responsible for timely receipt by BOA!

The above was prepared well before the instant matter arose and there is no reason to believe that the document does not accurately convey what the FS told the Appellant at that time. Accordingly, we find that Appellant was aware that the payment had to be to the FS by the due date. In fact, throughout its claim in this matter, Appellant has stated that it clearly was trying to meet that date and in fact believes it did.

Finally, regarding the dissent's conclusions as to the evidence, we have weighed all of the evidence presented before us in determining on what date the payment arrived. Both parties chose to waive

the right to a hearing and with that the right to cross examine witnesses from the other side. We thus deal with the record before us. We find our conclusion as to the actions of the courier to be the only reasonable conclusion one can draw from the evidence presented. Both Ms. Ribberty and Ms. Girolo were familiar with the practices and procedures of the courier. Given their descriptions, there is no basis but pure speculation to find that the courier deviated to the extent needed to support the dissent's conclusion and to find in favor of the Appellant.

**DECISION**

The appeals are denied.

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**HOWARD A. POLLACK**

Administrative Judge

**Concurring:**

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**ANNE W. WESTBROOK**

Administrative Judge

**Dissenting Opinion by Administrative Judge VERGILIO.**

Disagreeing with the factual and legal conclusions of the majority, I dissent from the decision of the Board. I would grant the appeal based upon the following rationale.

As specified in a letter dated October 8, 1999 (with emphasis added), the Government changed the place and time for receipt of payments sent by regular mail:

If you elect to use regular mail, you will need to consider the mail time to San Francisco. The cutoff time for receipt of mail-in payments is 7:00 a.m. at the Post Office Box. Payments that arrive after 7:00 a.m. will be deposited as the next day's business. Late payments are subject to interest charges regardless of who is at fault. To avoid late payment interest charges, allow at least 5 days mail time.

The purchaser mailed the check on December 20, 1999, for payment with a due date of December 27, 1999. The purchaser mailed the check in excess of five days in advance of the due date. Therefore, the purchaser having complied with the directive of the letter, by allowing at least 5 days mail time,<sup>@</sup> the Government may not assess late payment interest charges. With the Government's interpretation, this affirmative statement in the letter has no meaning. The sentence

does not say simply Awe recommend that you allow at least 5 days mail time@ or some other innocuous language. Rather, the explicit language informs a purchaser how to avoid late payment interest charges. Such a directive is of particular importance given that interest charges will otherwise accrue with late receipt, regardless of the cause of delay.

Seeking to recover money from the purchaser for late payments, the Government bears the burden of proof. According to the findings, the Government contends that the Post Office would have placed the post mark of December 31 when the courier picked up the parcel (FF 14). But courier pick up is not the triggering date. The above-quoted letter specifies that receipt at the post office box is the material event. The record lacks proof positive on that date of receipt. The record does not establish that a courier in fact picked up mail on any given day between December 24 through 30, inclusive. This key piece of evidence or material element to the case (when the parcel arrived at the post office box) could have been established by a statement from the courier service on its practices during the week in question, a contemporary business record of items in the lock box removed during the week before December 31, or a sworn statement that the parcel was not in the post office box prior to December 31 (or as of 7 am on December 27). Factually, I conclude that the Government has not met its burden of proof.

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**JOSEPH A. VERGILIO**

Administrative Judge

**Issued at Washington, D.C.**

**December 16, 2002**